

# Indiana Board of Special Education Appeals

Room 229 State House – Indianapolis, IN 46204-2798  
Telephone: 317/232-6676



## BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

**In the Matter of S.C., and  
Union Township School Corp.**

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**ARTICLE 7  
HEARING NO. HR 057-2009E**

**Appeal from the Decision of:  
Jeffrey Anderson  
Independent Hearing Officer**

**Status: Closed to Public**

### DECISION AND ORDER

This matter comes before the Board of Special Education Appeals (“BSEA”) on the Petition for Review filed by the Student.

#### **Procedural History<sup>1</sup> of the Due Process Hearing**

S.C. (“Student”) filed a request for an expedited<sup>2</sup> due process hearing on March 5, 2009, against Union Township School Corporation and Porter County Educational Services (collectively “the School”). On that date, the Superintendent of Public Instruction appointed Jeffrey Anderson, as the Independent Hearing Officer (“IHO”). Alexandra Curlin, Esq., appeared on behalf of Student, and Monica Conrad, Esq., appeared for the School.

The IHO conducted a telephonic prehearing conference on March 17, 2009, and identified the issues for hearing. On March 23, 2009, the Student filed a motion to consolidate HR-59-2009 with the instant case, and the IHO issued an Order on Prehearing Conference. Because the issue in HR-59-2009 is not the subject of an expedited hearing and because the parties did not agree to have the subsequent matter be heard as part of the expedited hearing, the Student’s motion to consolidate was denied.

An amended prehearing order was issued on March 24, 2009. This order amended the March 23<sup>rd</sup> prehearing order to change and add information about subpoenaing students. Requests for subpoenas to appear and *subpoena duces tecum* were requested by the Student and the School and were granted by the IHO.

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<sup>1</sup> The Procedural History is taken substantially from the Independent Hearing Officer’s final written decision. Neither party has objected to the IHO’s recitation.

<sup>2</sup> An expedited due process hearing is permitted in three situations. See 511 IAC 7-45-10. An expedited hearing and appeal are subject to shorter timelines than a due process hearing and appeal conducted pursuant to 511 IAC 7-45-7 and 7-45-9 respectively.

A final prehearing conference was conducted immediately prior to the first day of the expedited hearing.

#### Issues for Due Process Hearing

1. Whether SC's interim educational placement is appropriate, and
2. Whether the behavior that led to the interim placement was a manifestation of his disability.

The expedited due process hearing was conducted on April 6 and April 8, 2009.

#### IHO's Decision

Based on the testimony at the hearing and in consideration of the documentary evidence submitted, the IHO issued his written decision on April 21, 2009, including the following Findings of Fact, Conclusions of Law, and Orders. A corrected decision was issued on April 23, 2009<sup>3</sup> due to an incorrect notice of right to appeal statement in the original decision.

#### Findings of Fact

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5.3 *et seq.* and 511 IAC 7-30-3, which gives the IHO the authority to hear and rule upon all matters presented.
2. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact.
3. The Student is a 12 year old sixth grader at Union Township Middle School. The student previously attended schools in Illinois and in 2006, moved to Union Township Elementary School. Shortly after starting at Union Township Schools, concerns about the Student's academic levels were noted by the school. In response, a variety of learning adaptations were put into place for the Student, such as one-on-one instruction; reading assignments and tests aloud to the student; testing in small groups; and preferential seating.
4. In 2006, when the Student was in 4<sup>th</sup> grade, he was referred for special education testing. The 4<sup>th</sup> grade teacher also noted difficulties with the Student's writing, comprehension, retaining basic facts, turning in assignments, and time management. An additional concern included "blanking out" in class. In January of 2007, the student underwent psychological testing. The case conference committee convened on February 8, 2007 and decided that the Student was not eligible for special education. However, at that time, concern was noted about the possibility of an underlying medical concern related to his periodic 'blanking out'. Although this appears to be a concern or issue which may require some additional testing, the evidence did not indicate that this concern was related to the two issues that are being addressed in this hearing.
5. Since moving to Union Township, the Student's academic performance can be characterized as "poor" per the testimony of his teachers. The Student's teachers described him as unmotivated and lacking some of the basic skills needed to be successful at grade level. Teachers also noted that the Student has a tendency to not complete assignments, which substantially impacts both his learning and grades.

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<sup>3</sup> The only thing changed in the Corrected Decision was the Notice of Right of Appeal. The Findings of Fact, Conclusions of Law, and Orders remained as in the original decision.

6. During fall 2008, another referral to special education was made. Areas of concern included reading comprehension, math, written expression, and spelling. It was noted during eligibility procedures that the Student had been labeled with Attention Deficit Disorder (ADD) and was on prescribed medication for ADD.
7. On February 2, 2009, the Case Conference Committee (CCC) met and determined the student was eligible for special education under the category of Other Health Impairment, due to ADD.
8. The IEP noted that the Student “is taking medication for an attention deficit disorder; despite general education interventions, he continues to struggle academically.” The IEP also stated that the Student’s behavior does not impede his learning or that of others.
9. The IEP goals developed by the CCC included reading, compensatory skills, math, and written expression. His teachers testified that the student had been receiving similar accommodations in their classrooms before the IEP was written.
10. The case conference determined that the student was to receive direct special education services in reading, writing, and math, five days per week for 150 minutes per day and support services for compensatory skill up to 30 minutes per day.
11. The IEP also states the Student “is a good listener who is very polite and respectful.”
12. On the same day as the CCC, the School suspended the Student pending expulsion for selling prescription drugs on school grounds.
13. Per the testimony of the Principal, Mr. Lasky, the Student admitted to bringing two pills to school with the intention of selling them to another student. The Student’s purpose was to gain money to buy headphones.
14. According to testimony, during the week prior to this incident, the Student had prearranged with this other student to sell him two pills.
15. As a result of the incident, the School held a manifestation determination conference on February 9, 2009, which included Ms. Poland, the Student’s mother. During this conference, the evaluation and findings from the eligibility CCC (which had been held February 2, 2009) were reviewed.
16. The CCC on February 9, 2009 determined that the behavior in which the Student was selling his prescription medication to another student was not a manifestation of his disability.
17. On March 5, a Due Process Complaint was filed by the Petitioner with the Indiana Department of Education requesting an Expedited Due Process Hearing.
18. It was determined by the IHO that only expedited matters could be included as part of the Expedited Due Process Hearing. As noted, the hearing was held on April 6 and April 8, 2009.
19. Testimony during the hearing indicated that the School holds an annual ‘Red Ribbon Week’ during which students are provided information and instruction about drugs, including prescription medications.
20. It was the testimony of the Student’s teachers and Mr. Lasky that the Student clearly understood that distributing his prescription medications was prohibited by School’s policy.
21. Evidence and testimony indicated that all students including the Student in this case receive a student handbook that includes School rules and regulations. Both in smaller classroom

groups called “Advisory” as well as in grade level meetings in the school auditorium, teachers and the principal review school policies with the students.

22. The Principal, Mr. Lasky testified that he himself reviewed the school’s rule related to drug usage and distribution.
23. Testimony indicated that there was no history or behavior pattern related to the Student’s disability or otherwise that might have caused him to sell his prescription medication to another student.
24. The CCC determined that the Students Interim Alternative Education Setting (IAES) would begin on February 19, 200, immediately following a 10 day suspension. The IAES was to include two hours of instruction two times per week (for a total of 4 hours) in language arts and math.
25. The location for instruction initially was decided to occur at the Student’s home. Also, at some point, the instructional time for the Student was conjoined with that of another student (his cousin) whom also was receiving homebound instruction.
26. Dan Spears (the homebound instructor) testified because of an event that occurred during a session with the Student and the other student, Mr. Spears no longer wanted to provide services in the home setting (this event did not involve the Student). He also felt that providing services to both students together was not productive.
27. After this incident, the School contacted the Parent to discuss changing the location of instruction. However, according to Mr. Spears no more instructional sessions took place.

#### Conclusions of Law

1. This matter was properly assigned to this IHO pursuant to IC 4-21.5.3 *et seq.* and 511 IAC 7-30-3, which authorize the IHO to hear and rule upon all matters presented.
2. All Conclusions of Law that can be deemed Findings of Fact are hereby deemed Findings of Fact. All Findings of Fact that can be deemed Conclusions of Law are hereby deemed Conclusions of Law.
3. **Issue: Whether the behavior that led to the interim placement was a manifestation of the Student’s disability.**

This issue was framed for the hearing and the Conclusions of Law regarding it are based upon the evidence and testimony presented. The Student has an identified disability of Other Health Impairments related to his ADD. According to Article 7, (511 IAC 7-44-5 Manifestation determinations), *Within ten (10) instructional days of any decision to change the placement of a student with a disability for violating a code of student conduct, the CCC must meet to determine whether the student's behavior is a manifestation of the student's disability.* The CCC met per the requirements of Article 7 and determined that the behavior was not a manifestation of the Student’s disability. No evidence indicated that Student’s actions were (1) *caused by, or had a direct and substantial relationship to, the student's disability;* or (2) *the direct result of the public agency's failure to implement the student's IEP.*

Therefore, the IHO determines that the Student’s behavior was not a manifestation of his disability.

Article 7 (511 IAC 7-44-5 Manifestation determinations) goes on to state:

*If the CCC determines that the conduct is not a manifestation of the student's disability, school personnel may apply the relevant disciplinary procedures to the student in the same manner and for the same duration as those procedures would be applied to students without disabilities. However, the student must, during any removal that is ordered, continue to receive appropriate services.*

This leads to the second issue in this case.

**4. Issue: Whether the Student's interim educational placement is appropriate**

This issue also was framed for the hearing and the Conclusions of Law regarding it are based upon the evidence and testimony presented. As noted, the Student has an identified disability of Other Health Impairments related to his ADD. Article 7 (511 IAC 7-44-6 Interim alternative educational setting; weapons, drugs, and serious bodily injury) states that

*The principal or the principal's designee may remove a student to an interim alternative educational setting for not more than forty-five (45) instructional days without regard to whether the behavior is determined to be a manifestation of the student's disability, if the student: (2) knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance....while at school, on school premises....*

According to the evidence presented, the Student did attempt to sell or solicit the sale of a controlled substance while on school premises. Moreover, because the manifestation determination CCC had determined that the behavior was not a result of the Student's disability, the School was within its purview to place the Student in an IAES.

The core aspect of this issue is whether the IAES is an appropriate placement for the Student. According to Article 7,

*The student's CCC must determine appropriate services needed to enable the student to do the following: (1) Continue to participate in the general education curriculum, although in another setting. (2) Progress toward meeting the goals set out in the student's IEP.*

Such services may be provided in an interim alternative education setting (IAES), which, according to Article 7, are to be determined by the Student's CCC. The CCC did meet in accordance with Article 7 requirements and determined that homebound instruction of two hours two times per week was appropriate for allowing the Student to participate in the general education curriculum and progress towards meeting IEP goals.

The IHO determines that the School's decision to place the Student in an IAES was not a violation of Article 7 (511 IAC 7-44-6) and therefore determines that the homebound placement resulting from the Student's behavior was appropriate.

Orders

1. The IHO ORDERS that the case conference committee, including the parent convene to address the Petitioners concerns that the Student's academic progress has not been sufficient. The preponderance of the evidence in this hearing noted that the student continues to achieve below grade level and lacks basic skills necessary to participate fully and progress adequately in the general education curriculum. This concern alone should prompt the CCC to review its current provision of 4 hours of homebound instruction per

week, to ensure that the amount and type of homebound instruction is of sufficient duration and intensity to meet the Student's IEP goals.

2. The IHO ORDERS that pursuant to Order #1, if no changes are deemed necessary by the CCC in terms of the amount of weekly instructional time provided to the Student, then the School will administer the current Plan. That is, the School will provide instruction to the Student for at least two hours two times a week. The School also will monitor these efforts to ensure that the Student is both participating in the general education curriculum and progressing toward meeting the goals set out in his IEP.
3. The IHO ORDERS that the School work with the Parent to find an acceptable location for the provision of homebound instruction to the Student.

## **BEFORE THE BOARD OF SPECIAL EDUCATION APPEALS**

### **Procedural History of the Board's Review**

The Student filed a Petition for Review on April 28, 2009. On the same day, the Student filed a separate Expedited Motion to Clarify Stay-Put. The BSEA issued an Order on the Student's motion on April 29, 2009, clarifying the Student's placement and services to be provided during the pendency of the appeal. Also on April 29, 2009, the Student sent a letter advising that the Statement of Facts in the Petition should be corrected to reflect that the Student has received four hours of service during the week of April 20, 2009, and that an additional four hours of service were expected the week of April 27, 2009. The School filed its Reply to the Petition for Review on May 1, 2009.

### **Student's Petition for Review**

The Student presents four issues on appeal, and therein raises objection to Findings of Fact 3, 4, 5, 6, 7, 9, 10, 20, 21, 22, and 23, as well as Conclusions of Law 3 and 4.

**Issue #1:** The Student asserts that the IHO erred in declining to hear all the issues articulated in the due process request and that such decision was arbitrary, contrary to public policy, and prejudicial to the Student. The Student states that six issues were identified in the request for due process hearing, but the IHO limited the issues to a review of the manifestation determination decision and the appropriateness of the interim alternative education setting.

The Student argues that the IHO's reliance on 511 IAC 7-45-10 to limit the issues is misplaced, asserting that: (1) 511 IAC 7-45-10 does not limit the issues subject to an expedited due process hearing, and (2) pursuant to the board's decision in the M.O. case, the IHO has the authority to hear all issues on an expedited timeline. The Student disputes the IHO's position that agreement of the parties is required in order to include additional issues in an expedited hearing, and asserts that any prejudice to the School resulting from the shortened timelines is mitigated because the expedited timelines are only slightly shorter than the timelines for a non-expedited hearing.

In an apparent alternative to having all issues heard in an expedited manner, the Student also proposes that the IHO could have bifurcated the issues within the single hearing. The Student suggests that the IHO could have put all of the issues on a non-expedited timeline, but issued an interim decision on the manifestation determination and the interim alternative educational setting.

As part of the assignment of error, the Student states that the IHO erred further when he failed to take any action on the remaining issues that were not addressed in the expedited hearing. The

Student cites several instances of asking the IHO for direction on resolving the remaining issues and notes that the IHO failed to issue any order or make any decision on those issues. The Student claims that, as a result of this inaction, the Student was “[forced] to file another request for due process on April 7, 2009. . .”

Issue #2: The Student asserts that the IHO erred in determining that the Student is a student with an other health impairment rather than a student with a learning disability. The Student argues that the IHO’s decision was arbitrary because it required the Student to “put on uncontroverted appropriate evidence to prove that the student has a learning disability” that was disregarded by the IHO.

The Student takes issue with Findings of Fact 3, 4, 5, 6, 7, 9, and 10. With regard to Finding of Fact 3, the Student asserts that the evidence establishes that the Student has been struggling academically for some time, contrary to the IHO’s finding that the concerns about the Student’s academic struggles surfaced after the Student began attending the School in 2006. Similarly, the Student asserts that Findings of Fact 4, 5, and 6 are unsupported by, inaccurately depict, or otherwise ignore the evidence presented with regard to the Student’s referral for evaluation, the Student’s academic performance, and the diagnosis of ADD. The Student describes, but does not provide citation to, various testimony provided at the hearing to support the claim that the IHO’s findings are erroneous.

With Findings of Fact 7 and 9, the Student argues that the IHO incorrectly found that the case conference committee made determinations and developed goals, asserting that the evidence and testimony presented support findings that the parent was not a participant in the case conference committee’s decision making.

The Student posits that, had Findings of Fact 3, 4, 5, 6, 7, 9, and 10 been based on the evidence cited by the Student, the correct result would be a finding that the Student is a student with a learning disability.

Issue #3: The Student asserts that the IHO erred in concluding that the Student’s behavior was not a manifestation of the Student’s disability. The Student argues that, because the IHO incorrectly determined that the Student had an other health impairment, the IHO failed to determine if the student’s learning disability caused or had a direct and substantial relationship to the student’s behavior resulting in the disciplinary action.

The Student claims the IHO “mischaracterized the facts and ignored relevant and uncontroverted testimony” and identifies Findings of Fact 14, 15, 21, 22, and 23 as examples of the IHO’s errors. The findings address the Student’s role in the underlying incident, the conduct of the manifestation determination case conference committee meeting, the Student’s understanding of the rules, and the lack of history or pattern related to the behavior in question. Without any citation to the record below, the Student generally describes the testimony of various witnesses, asserting that such testimony is uncontroverted and demonstrates the inaccuracy of the IHO’s findings and the Conclusion of Law based on those findings.

Issue #4: The Student asserts that the IHO erred in concluding that the IAES (homebound placement) chosen by the school is appropriate, claiming that such decision is “arbitrary . . . unsupported by the evidence, and contrary to the standards set forth in the IDEA and Article 7.” The Student argues that the IHO failed to: (1) cite any authority that permits an IAES to be a homebound setting, (2) make any findings that the homebound setting allowed the student to continue to participate in the general education curriculum, progress toward IEP goals, and receive services needed to prevent the behavior from recurring, and (3) consider the least restrictive environment for the IAES.

## **School's Response to Petition for Review**

The School asserts that the IHO's decision is correct in all aspects.

As an introductory matter, the School takes issue with the format and content of the Student's Petition for Review. The School asserts that the Petition: (1) does not comport with the requirement that a petition for review "be specific as to the reasons for the exceptions to the IHO's decision, identifying portions of the findings, conclusions, and orders to which exceptions are taken," and (2) fails to generally cite to the supporting evidence, documents or identified witness testimony within the record which contradicts the IHO's decision."

With regard to Student's Issue #1, the School cites 611 IAC 7-45-10 in support of its position that the IHO correctly limited the issues for the expedited hearing to a review of the manifestation determination and the appropriateness of the interim alternative educational setting. The School also distinguishes M.O. and its applicability to the instant case, asserting that M.O. provides that Student with the right to a final appealable order from an expedited hearing, but does not afford the Student the right to have additional issues heard within the expedited timeline.

In response to Issue #2, the School asserts that the IHO's finding that the Student is a Student with an other health impairment is supported by substantial evidence. The School characterizes Findings of Fact 3, 4, 5 and 6 as relating to the question of whether the School should have identified the Student earlier, asserting that identifying the Student as a student with a disability two years prior has no bearing on the issue of whether the student's current behavior is a manifestation of the Student's disability. The School provides various citations to the record to demonstrate that Findings of Fact 3, 4, 5, and 6 are substantially supported by the evidence.

The School disputes the Student's characterization that the parent was not allowed to participate in the February 2009 CCC meeting, citing the parent's signed agreement with the determination of eligibility, goals, and plan for services. Citing the evidence in the record and a variety of case law, the School also argues that Findings of Fact 7 and 9 are supported by substantial evidence, within the IHO's authority, and in accord with federal and state law.

On Student's Issue #3, the School asserts that the IHO's finding that the Student's behavior was not a manifestation of the Student's disability are supported by substantial evidence and consistent with the law. The School counters the Student's assertions on Findings of Fact 14, 20, 21 and 23 by citing testimony and evidence in the record and case law in support of the IHO's findings and conclusion on the issue of the CCC's manifestation determination.

With regard to Student's Issue #4, the School argues that the IHO's Findings, Conclusions, and Orders on the appropriateness of the IAES are supported by substantial evidence in the record and should be affirmed. The School disputes that Student's arguments to the contrary as being outside of "Article 7's standard for reversing the IHO decision." Citing various testimony and evidence in the record, the School asserts that the IHO properly applied 511 IAC 7-44-5 and 511 IAC 7-44-6 to the facts presented.

The School also disputes the Student's assertion that an IAES must be in the least restrictive environment, citing 511 IAC 7-44-4 511 IAC 7-44-6, 20 USC 1415(1)(G)(ii), 20 USC 1415(k)(e), and commentary to the federal regulations. The School argues that there is no least restrictive environment requirement in an IAES, and that criteria for determining the appropriateness of an IAES is governed by 511 IAC 7-44-5(f) which requires the CCC to determine appropriate services needed to enable the Student to: (1) continue to participate in the general education curriculum, although in a different setting, (2) continue to progress toward meeting the IEP goals, and (3) as appropriate, receive a functional behavioral assessment, behavioral intervention services and modifications designed to prevent recurrence of the behavior violation.



In closing, the School asserts that, pursuant to the United States Supreme Court decision in *Schaffer v. Weast*, 126 S.Ct. 528 (2005), the Student has the burden of proof and burden of persuasion on the issues presented for hearing and the Student has failed to satisfy those burdens with respect to the two issues decided by the IHO. In the alternative, the School asserts that should error be found, it is harmless error and does not change the underlying decision.

### **REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS**

On May 11, 2009, the Board of Special Education Appeals (“BSEA”) convened in Indianapolis for the purpose of conducting the expedited review in this matter. All three members were present and had reviewed the entire record. Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, and the Response thereto, the BSEA now decides as follows.

#### **Jurisdiction**

The BSEA is established to review an IHO’s decision in a due process hearing conducted under 511 IAC 7-45. This includes an appeal of an expedited due process hearing conducted pursuant to 511 IAC 7-45-10. Either party to the due process hearing may request a review of the IHO’s decision by the BSEA by filing a Petition for Review. 511 IAC 7-45-9 The Petition for Review must be specific as to the reasons for the exceptions to the IHO’s decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken. 511 IAC 7-45-9(d)(4). The BSEA assumed jurisdiction of this matter upon the Student’s filing of a Petition for Review on April 28, 2009.

#### **Standard of Review**

An IHO’s decision must contain separately stated findings of ultimate fact, conclusions of law, and, if applicable, orders. The conclusions of law must be based upon the findings of fact and the orders must be derived from the conclusions of law. I.C. 4-21.5-3-27(b).

In conducting a review of an IHO’s decision, the BSEA reviews the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-45-7. The BSEA will not disturb the IHO’s Findings of Fact, Conclusions of Law, or Orders except where the BSEA determines that a Finding of Fact, Conclusion of Law, or Order is:

- a. Arbitrary and capricious;
- b. An abuse of discretion;
- c. Contrary to law, contrary to a constitutional right, power, privilege, or immunity;
- d. In excess of the IHO’s jurisdiction;
- e. Reached in violation of established procedure; or
- f. Unsupported by substantial evidence.

511 IAC 7-45-9(j).

### **Combined Findings of Fact and Conclusions of Law**

1. Any Finding of Fact that may be interpreted or viewed as a Conclusion of Law is hereby so designated and is hereby so concluded. Any Conclusion of Law that may be interpreted or viewed as a Finding of Fact is hereby so found.
2. The IHO did not err in limiting the issues to be heard in the expedited due process hearing. However, the IHO erred in failing to dispose of or otherwise deal with the other issues presented in the Student’s request for a due process hearing. The other issues include whether the School:  
(a) failed to provide the Student a free appropriate public education by inaccurately identifying

the student's disability category, failing to identify the Student's present levels of performance, failing to include appropriate goals, and failing to identify any program or service to assist the Student in improving attention span and decreasing distractibility; (b) inappropriately excluded the Student from extracurricular and non-academic activities during placement in an IAES; and (c) failed to respond to the parent's request for an independent educational evaluation. In issuing the final order without addressing the remaining issues, the IHO constructively and erroneously dismissed those issues.

3. The appropriateness of the Student's identified eligibility category was not an issue in the hearing below. In Finding of Fact 7, the IHO did not make a determination of the appropriateness of the Student's identified eligibility, but correctly found that the CCC had made such determination.
4. A change in eligibility category would not alter the ultimate conclusion that the Student's behavior was not a manifestation of the Student's disability. Nothing in the record demonstrates that the Student's disability, regardless of identified eligibility category, was the cause of or had a direct and substantial relationship to the Student's behavior of offering prescription drugs for sale.
5. Findings of Fact 3, 4, 5, 7, 9, and 10 are substantially supported by evidence in the record.
6. Findings of Fact 14, 15, 20, 21, 22, and 23 are substantially supported by evidence in the record.
7. Conclusion of Law #4 is not substantially supported by the Findings of Fact and the evidence in the record with regard to the appropriateness of the homebound placement as the IAES because the co-offender was in the home and participated in homebound instruction with the Student. The last paragraph of Conclusion of Law #4 is amended as follows:  
"The IHO determines that the School's decision to place the Student in an IAES was not a violation of Article 7 (511 IAC 7-44-6). However, the homebound location of the IAES was not appropriate."
8. Except for Conclusion of Law #4, the IHO's Findings of Fact and Conclusions of Law are not arbitrary or capricious, nor are they an abuse of discretion. The Findings of Facts and Conclusions of Law are not contrary to any constitutional right, power, privilege or immunity nor are they in excess of the IHO's jurisdiction or otherwise reached in violation of established procedure. The Findings of Fact and Conclusions of Law are supported by substantial evidence.
9. Any claims not addressed in the record or in the IHO's Findings of Fact and Conclusions of Law are outside the scope of appellate review. 511 IAC 7-45-7; 511 IAC 7-45-9

### **Orders**

In consideration of the foregoing, the intervening order on the Student's Expedited Motion to Clarify Stay-Put, and review of the entire record, the Board of Special Education Appeals issues the following order(s):

1. The School shall continue to provide instructional services for two hours a day, two days each week until the end of the school year. The instructional services shall be provided at SELF.

2. The School shall provide compensatory instruction prior to the beginning of the 2009-2010 school year to make up for missed instructional services between the cessation of homebound services and the initiation of instruction at SELF. The School shall provide a minimum of 20 hours of compensatory instruction at SELF or any other out-of-home location the School deems appropriate. If the School chooses to provide the compensatory services prior to the end of the 2008-2009 school year, the compensatory hours are in addition to the previously established four hours per week of instruction for the remainder of the school year.
3. If requested by the Student, the IHO shall allow the issues identified in Conclusion of Law #2 to be included in HR 059-2009. In the alternative, the Student may file a separate request for due process hearing on those issues.

DATE: May 12, 2009

/s/ Rolf Daniel  
Rolf Daniel, Ph.D., Chair  
Board of Special Education Appeals

### **NOTICE OF RIGHT TO APPEAL**

The decision of the Board of Special Education Appeals is a final order unless a party seeks judicial review. Any party aggrieved by the decision of the Board of Special Education Appeals has the right to seek judicial review in a civil court with jurisdiction within thirty (30) calendar days from receipt of this written decision, as provided by I.C. 4- 21.5-5-5 and 511 IAC 7-45-9(n).

### **ATTORNEYS' FEES**

An action for attorney's fees must be filed in a civil court with jurisdiction within thirty (30) calendar days after receipt of the Board of Special Education Appeals final decision if no request for judicial review is filed in federal or state civil court. 511 IAC 7-45-11